

Cite as Det. No. 07-0150, 27 WTD 114 (2008)

BEFORE THE APPEALS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition For Correction of )	<u>D E T E R M I N A T I O N</u>
Assessment of )	
)	No. 07-0150
)	
... )	Registration No. . . .
)	Doc. No. . . . /Audit No. . . .
)	Docket No. . . .
)	

RULE 18801; RCW 82.08.0283: SALES TAX – EXEMPTION – PROSTHETIC DEVICE – CPAP AND BI-PAP MACHINES. For the purpose of the prosthetic device exemption, to wear a device means the entire device or system is something a person puts on or has on their person, to be carried with and habitually become part of the person as a whole, much in the sense that a person wears clothing or other personal items. Such devices are designed to be wholly worn and portable, not partially floor-standing, or moved by virtue of dragging, wheels, or with the assistance of a separate device (e.g. a cart or intravenous stand), or partly resting on a nightstand. Thus, CPAP machines, in general, are durable medical equipment, and not prosthetic devices. Patients using CPAP machines are normally hooked up to the machines via tubing and individually tailored masks. Even though the mask is normally “worn” for significant periods of time each night, the mask by itself can not accomplish the intended purpose. The machine performing the function generally is not worn on the body as a complete system. Neither the mask separately, nor the machine as a whole system, is a prosthetic device.

Headnotes are provided as a convenience for the reader and are not in any way a part of the decision or in any way to be used in construing or interpreting this Determination.

De Luca, A.L.J. – A medical doctor whose business activities in Washington during the audit period included operating . . . clinics providing care to patients with sleep disorders, including obstructive sleep apnea, protests the assessment of retail sales tax on the sales of continuous positive airway pressure machines (CPAP) and bi-level positive airway pressure machines (Bi-PAP) and related accessories (including, for example, nasal devices headgears, chinstraps, tubing, filters, filters, face masks, humidifiers, humidifier heaters), as well as oral appliances. We conclude that CPAP and Bi-PAP machines are generally subject to retail sales tax as

“durable medical equipment.” However, certain CPAP machines that are worn on the patient’s body and oral appliances qualify as “prosthetic devices and are exempt from retail sales tax. Petition granted in part.<sup>1</sup>

## ISSUES

1. Are the sales of CPAP and Bi-PAP machines to patients exempt from retail sales tax under RCW 82.08.0283 as prosthetic devices?
2. Are the sales of oral devices to patients exempt from retail sales tax under RCW 82.08.0283 as prosthetic devices?

## FINDINGS OF FACT

The taxpayer is a licensed physician who has . . . clinics in Washington providing medical services to patients with sleep disorders, including obstructive sleep apnea (OSA). The taxpayer sells to patients medically prescribed CPAP and Bi-PAP machines and oral appliances used in the treatment of OSA. The taxpayer did not collect retail sales tax on the sales of these machines and the oral appliances.

OSA is a chronic breathing disorder characterized by repeated collapse of the upper airway during sleep, with consequent cessation of breathing. There are several reasons an airway may collapse during sleep: (1) extra tissue in the back of the airway such as large tonsils; (2) a decrease in the tone of the muscles holding the airway open, (3) the tongue falling back and closing off the airway. If OSA is not treated, sleep patterns are disrupted, resulting in excessive sleepiness or fatigue during the day. The patient is also at risk for high blood pressure, heart disease and heart attack, stroke, fatigue-related motor vehicle and work accidents, and a decreased quality of life.

One way OSA is treated is by using a device to provide air pressure support for the walls of the airway during sleep. This technique, called continuous positive airway pressure (CPAP), uses a mask that fits over the nose to force air into the airway through the nostrils. Nasal CPAP works by creating a pneumatic splint to keep the airway open. OSA can also be treated by the use of Bi-PAP, or bi-level air pressure. Bi-PAP machines force air into a patient’s airways at two different pressure levels (one for inhalation, and the other for exhalation).

CPAP and Bi-PAP<sup>2</sup> machines must be prescribed by physicians who must also prescribe what air pressure level(s) will suit each patient’s particular needs. The taxpayer’s clinics will fit and train each patient to the correct machine. A wide variety of masks are available to accommodate various facial structures and patient comfort when sleeping. Air pressure must be fine tuned. A

---

<sup>1</sup> Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

<sup>2</sup> Hereafter referred to collectively as CPAP machines.

patient cannot adjust the pressure. Only trained personnel with correct equipment can correctly adjust the pressure.

CPAP machines have various components, including a heated base upon which a water reservoir is seated. The water reservoir and humidifier tank supply any desired humidity. The CPAP blower provides the pressure. The machine has various filters. The face mask is attached to the hose.

Some patients use oral appliances for OSA rather than using CPAP machines. In fact, oral appliances are rarely used with CPAP machines. Oral appliances are, in essence, specialized night guards that the patients place in their mouths prior to sleep to support the jaw, tongue and soft palate and prevent those body parts from obstructing the airway. Oral appliances are individually fitted and are not transferable to another patient or person.

The Audit Division of the Department of Revenue (DOR) [reviewed the taxpayer's records for the period January 1, 2001 through June 30, 2006 and] assessed the taxpayer \$. . . in retail sales tax, \$. . . in retailing business and occupation (B&O) tax and credited the taxpayer \$. . . in service and other business activities B&O tax that he reported. With interest and a five percent assessment penalty the assessment amounted to \$. . . . The Audit Division determined that the sale of CPAP machines and accessories and oral appliances are subject to retail sales tax as durable medical equipment, *infra*. The taxpayer has partially paid the assessment, but contests the assessment of retail sales tax on the CPAP machines and oral appliances.

#### ANALYSIS

The taxpayer contends that the sales of CPAP machines and oral appliances are exempt from retail sales tax pursuant to RCW 82.08.0283(1)(a) because they meet the definition of prosthetic device under RCW 82.08.0283(4)(a), *infra*. RCW 82.08.0283 provides:

(1) [Retail sales tax] shall not apply to sales of . . .

(a) Prosthetic devices prescribed, fitted, or furnished for an individual by a person licensed under the laws of this state to prescribe, fit, or furnish prosthetic devices;  
. . .

(3) The exemption in subsection (1) of this section shall not apply to sales of durable medical equipment or mobility enhancing equipment.

(4) The definitions in this subsection apply throughout this section.

(a) "Prosthetic device" means a replacement, corrective, or supportive device, including repair and replacement parts for a prosthetic device, worn on or in the body to:

(i) Artificially replace a missing portion of the body;

- (ii) Prevent or correct a physical deformity or malfunction; or
- (iii) Support a weak or deformed portion of the body.

(b) "Durable medical equipment" means equipment, including repair and replacement parts for durable medical equipment that:

- (i) Can withstand repeated use;
- (ii) Is primarily and customarily used to serve a medical purpose;
- (iii) Generally is not useful to a person in the absence of illness or injury; and
- (iv) Does not work in or on the body.

(Emphasis added.) The facts show CPAP machines do correct physical malfunctions and/or support weak portions of the body to prevent obstruction of the patients' airways caused by OSA. But in construing this definition of "prosthetic," we find that a device is not "worn on or in the body" simply because part of it is attached to the body in some way for a period of time. For the purpose of the prosthetic exemption, to wear a device means the entire device or system is something a person puts on or has on their person, to be carried with and habitually become part of the person as a whole, much in the sense that a person wears clothing or other personal items. Such devices are designed to be wholly worn and portable, not partially floor-standing, or moved by virtue of dragging, wheels, or with the assistance of a separate device (e.g. a cart or intravenous stand), or partly resting on a nightstand.

Thus, CPAP machines, in general, are durable medical equipment, and not prosthetic devices. Patients using CPAP machines are normally hooked up to the machines via tubing and individually tailored masks. Even though the mask is normally "worn" for significant periods of time each night, the mask by itself can not accomplish the intended purpose. The machine performing the function is not worn on the body as a complete system. Neither the mask separately, nor the machine as a whole system, is a prosthetic device.

But the taxpayer has presented evidence of at least one CPAP machine that meets the statutory definition of prosthetic device. It is a rechargeable battery-powered CPAP machine . . . that is fully self-contained. Like other CPAP machines it has a mask with head gear and a hose connecting the mask and power unit. But there are no cords to plug in. It does not rest on a nightstand. Instead, it can be worn completely on the body by wrapping it around the user's neck and resting on the shoulders like a soft airline pillow. In fact, [this fully self-contained] CPAP machine was designed with travelers in mind for sleeping situations, such as on planes, trains, busses, etc., which require the unit be worn completely on the body. Thus, the . . . wrap-around form, plus the intended use that it was designed for (to be worn completely on the body in such situations) satisfy the definition of "prosthetic device." If there are other CPAP machines with similar features they, too, would qualify for the prosthetic device sales tax exemption.

Oral appliances also qualify as prosthetic devices for the sales tax exemption. Without question they are worn completely in the body and are individually fitted to prevent physical malfunctions and/or support weak portions of the body to prevent obstruction of the patients' airways caused by OSA.

### DECISION AND DISPOSITION

The taxpayer's petition is granted in part. Sales to patients of oral appliances and CPAP machines such as the [fully self-contained] model described above are exempt from retail sales tax. Sales of CPAP and Bi-PAP machines that are not designed and intended to be worn completely on the body are not exempt from retail sales tax when sold to patients.

Dated this 13th day of June, 2007.